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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1172

STANLEY HUBERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 2, 1966.

CITATION TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (App. 1a) is as yet unreported.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED.

May a conviction be sustained on an indictment charging violations of the Bankruptcy Act, involving concealment of assets, where the test submitted to the jury was whether or not the petitioner at the time of purchase intended to pay for the merchandise?

STATUTORY PROVISIONS.

The Bankruptcy Act, 18 U.S.C., Section 152, as amended June 12, 1960, provides in pertinent part:

> "Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt, or . . ."

And, makes it a crime also for anyone:

> ". . . in contemplation of a bankruptcy proceeding by or against him or other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property of such other person or corporation, or . . ."

(The other provisions of the Act deal with matters not here involved.)

STATEMENT OF THE CASE.

For several years prior to October 6, 1962, the date of his death, Samuel Steinbrecker owned a furniture store at 1850 Ridge Avenue, Philadelphia, Pennsylvania.

In August of 1963, the administratrix undertook to sell the premises as real estate. In pursuance of this decision, she employed a real estate broker to find a purchaser. Shortly thereafter, the real estate broker produced a customer who represented himself to be Israel Gerson. After preliminary negotiations between the parties, an agreement of sale was entered into under the terms of which title was to be transferred to Israel Gerson on December 10, 1963 for a total consideration of $19,000.

After the agreement had been signed and the down money paid, the parties negotiated for a lease of the premises for the period of September 10, 1963 to December 10, 1963 (the date of proposed settlement on the agreement of sale) at a monthly rental of $150.00, or a total of $450.00.

The parties also negotiated an agreement for the purchase by Israel Gerson of some of the stock and fixtures of the store. Under the terms of this agreement, the purchaser, Israel Gerson, acquired the right to use the trade name S. Steinbrecker & Co., in the conduct of the business at the leased premises.

At the time of the sales agreement, the Dun and Bradstreet rating of S. Steinbrecker & Co. was C-2, a rating which, in the business world, indicated a credit rating of $75,000.00 to $125,000.00.

Israel Gerson caused a Fictitious Names Registration to be filed under the laws of the Commonwealth of Pennsylvania and the laws of the City of Philadelphia, registering his name as the sole proprietor of the fictitious name, S. Steinbrecker & Co.

The evidence of the Government was to the effect that Israel Gerson was a fictitious name and that the person

who purported to be and represented himself as Israel Gerson was, in fact, Petitioner Stanley Huberman.

Upon assuming possession of the premises and commencing operations, the Petitioner commenced placing orders with manufacturers and distributors of furniture, appliances, housewares, candies and other similar type commodities. The merchandise was generally delivered to either the premises at 1850 Ridge Avenue or at a warehouse leased by Israel Gerson at 1515 W. Thompson Street, Philadelphia, Pennsylvania.

On December 26, 1963, a Creditor's Petition in the matter of Stanley Huberman, trading as Israel Gerson and S. Steinbrecker & Co., was filed and on January 13, 1964, an adjudication of bankruptcy was entered.

On January 21, 1964, a statement of affairs was filed by the bankrupt listing, inter alia, unsecured claims in the total amount of $95,642.63. The evidence disclosed that, in addition to the listed claims, proofs of loss were filed by other unsecured creditors aggregating in total amount some $48,000.00.

There were also some claims with respects to rents, utilities and the like in insignificant amounts.

The assets consisted of stock on hand, which was under seizure on a constable levy, but recovered by the receiver and sold at auction for approximately $4,000.00.

Petitioner was charged in the three-count indictment herein involved with:

Count I	Conspiring with his two co-defendants, Barnet Secouler and Jacob Basen, to violate the Bankruptcy Laws of the United States.
Count II	Concealment of Assets.
Count III	Charging Stanley Huberman, Petitioner, with violating the False Oath Statute in connection with his alleged false swearing on the statement of affairs.

The Government sought to establish that the Petitioner concealed the assets acquired from the creditors, or converted them into cash and concealed the cash from the creditors or receiver after bankruptcy.

There was no evidence of the actual existence of assets or cash at the time of the bankruptcy.

In his defense, Petitioner testified that he did not, at any time, conceal assets or intend to. His testimony was to the effect that he had purchased the merchandise intending to sell it at a profit and conduct his business in a normal manner, but that he had gambled money at various race tracks and lost heavily, and that he got deeper and deeper into financial difficulties and ultimately had to sell merchandise at less than half of the cost to pay his gambling debts and endeavor to recoup.

The jury convicted Petitioner on all three counts of the indictment. He was sentenced, immediately upon conviction, to two five-year terms of imprisonment, to run consecutively. These were later reduced to three-year terms.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below affirms a charge to jury in which the issue of guilt was submitted to the jury in the following language:

> "You will consider at the outset of this thing at some time in December, whether, as the Government charges, there was a plan to obtain this property, move it from one place to the other, sell it and then not pay for it. It will be up to you to decide whether that was concealing assets from the creditors and whether that was a purposeful plan."

And, in another section of the charge, the Court applied this test:

> "The Government says there was a conspiracy to rely on the Dun & Bradstreet rating of Steinbrecker's to accumulate this property, and, in effect, convert it to their own use, knowing and contemplating that they would be thrown into bankruptcy and by that time there would be nothing left for the creditors."

The conflict amongst the federal circuits on the question of whether the above-quoted language is a sufficient test is apparent from a review of the following cases decided by other federal circuits:

Cooplan v. United States, 147 F. (2d) 333 (8th Cir. 1945), cert. denied, 325 U.S. 88;
United States v. Zimmerman, 158 F. (2d) 559 (7th Cir. 1946);
United States v. Stone, 282 F. (2d) 547 (2nd Cir. (1960), cert. denied, 364 U.S. 928.

In the *Stone* case the court held that a defendant was entitled to a charge that the issue was whether on the date

of the appointment of the receiver he had in his possession property or its proceeds.

2. In the instant case, the proof of concealment was based on a shrinkage or shortage of inventory and an inference of guilt arising therefrom. There was no evidence of the presence of any assets or cash in the possession of the bankrupt at the time of the appointment of the receiver. The evidence merely tended to show purchases of inventory and the absence of an equal amount of inventory or proceeds on the date of bankruptcy.

This theory of inference of guilt is in complete conflict with the decisions of the Second Circuit.

In *United States v. Stone,* 282 F. (2d) 547 (2nd Cir. 1960), cert. denied, 364 U.S. 928, the Court specifically rejected as improper a charge that "evidence of a merchandise shortage permits an inference of guilt."

Indeed, in the Third Circuit, in *United States v. Schireson,* 116 F. (2d) 881 (3rd Cir. 1940), it was held that the crime would only be made out by a showing that at the time of bankruptcy the defendant had in his possession assets which he concealed from the receiver. The fact that he gave the assets away or that he had squandered them can not be the basis for a criminal charge.

> "It may well be within the power of Congress to declare that one who, with the approaching specter of bankruptcy, gives away his assets may be guilty of a crime. But it is neither the crime of false pretenses nor false swearing with regard to assets on hand at the time the bankruptcy occurs."

3. The issues presented by this petition are of extreme importance because of the increased frequency of indictments charging violation of the Bankruptcy Law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant a Writ of Certiorari to settle the question of whether the inference of guilt may be drawn from a mere shortage of inventory and the equally important issue of whether Congress intended that the Bankruptcy Act provide the basis for prosecution for obtaining goods under false pretenses.

Respectfully submitted,

G. FRED DIBONA,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15570

UNITED STATES OF AMERICA

v.

STANLEY HUBERMAN,
Appellant.

(D. C. Criminal No. 21897)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MCLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment, filed June 22, 1965 as amended by order filed August 16, 1965, of the District Court be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF,
Clerk.

March 2, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15570

UNITED STATES OF AMERICA

v.

STANLEY HUBERMAN,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 10, 1966

Before McLAUGHLIN, FORMAN and GANEY, *Circuit Judges*

OPINION OF THE COURT

(Filed March 2, 1966)

PER CURIAM.

We think that appellant's filing of his notice of appeal was timely under the facts before us. O'Neil v. United States, 272 F.2d 412 (5 Cir. 1943).

Regarding the merits, we find that there is no error of substance in the trial record.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1172

STANLEY HUBERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in a three-count indictment with conspiring to violate the federal bankruptcy laws, concealing assets with the intent to defraud creditors, and making a false oath regarding the amount of debts owed by his bankrupt firm, in violation of 18 U.S.C. 152 and 371. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was found guilty on each count and was sentenced (as amended) to imprisonment for consecutive three-year terms on counts 1 and 2, and five years' probation and a $5,000 fine on count 3. The court of appeals affirmed *per curiam* (Pet. App. 2a).

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The evidence showed that in 1963 petitioner had been the owner of a retail appliance store in Philadelphia and that that activity had been terminated by constable sale in July of that year. The following month, while still $20,000 in debt to creditors of the appliance store, petitioner procured the service of one Israel Gerson to purchase a furniture store which had a good credit rating (R. 20b–24b, 27b–30b, 57b–61b).[1] For the next three months petitioner, representing himself as Gerson and utilizing the credit of the acquired furniture store, ordered small appliances and other goods by telephone, and received approximately $150,000 of merchandise on credit (R. 35b–41b). Shortly after their receipt, the goods were transferred, in part, to petitioner's warehouse and, in part, to a group of "wholesalers." Consequently, when, in December 1963, a petition for an adjudication of involuntary bankruptcy was filed, few assets were found at the furniture store. A receiver was appointed in December and petitioner was adjudicated a bankrupt in January 1964. In the bankruptcy proceedings petitioner reported liabilities of only $95,642.63; he failed to report additional liabilities aggregating some $48,000 (Pet. 4). Petitioner kept no books of account and attributed his failure to schedule the remaining debts to his having "lost" many invoices, some of which were located by a federal agent in a trash can within the store (R. 69b, 55b). Petitioner denied conspiring to defraud his creditors. He al-

[1] Citations are to the "Appellee's Appendix," filed with the Clerk of this Court, containing the indictment, the judge's closing instructions, and petitioner's testimony.

leged that he was a poor businessman, and had lost money either by selling below cost or unsuccessful wagers at the race tracks (R. 33b, 65b).

To prove that petitioner had some of the missing merchandise in his possession when the receiver was appointed, the government showed that a large number of the orders, purchased on credit, were received by petitioner during September-November 1963 [2] and that the assets involved were not of the kind which in the normal course of business would have been completely dispersed by a small furniture store within one month's time. By its verdict the jury rejected petitioner's explanation that he squandered over $140,000 of assets at various race tracks and that he innocently failed to maintain records of account. Under the circumstances proved, the jury could reasonably infer that petitioner had assets which he concealed from the receiver. As stated in *Rudin* v. *United States,* 254 F. 2d 45, 51 (C.A. 6), certiorari denied, 357 U.S. 930:

> Appellant's testimony in his own behalf, in our opinion, failed to rebut the reasonable inferences to be drawn by the jury from the Government's evidence hereinbefore reviewed. Such evidence was sufficient to take the case to the jury and sustain the verdict. * * *

See also *Noell* v. *United States,* 183 F. 2d 334 (C.A. 9), certiorari denied, 340 U.S. 921; *Bisno* v. *United States,* 299 F. 2d 711 (C.A. 9), certiorari denied, 370

[2] Petitioner admitted ordering and receiving the merchandise from more than 25 distributors from all over the country (R. 35b–41b).

U.S. 952. Petitioner's subsequent failure to schedule assets worth in excess of $40,000, the conduct of the bankrupt, the character of the assets, and the reasons given for their omission from the schedule, further justified the jury's verdict. *Coghlan* v. *United States,* 147 F. 2d 233 (C.A. 8), certiorari denied, 325 U.S. 888.

Petitioner's quotations from two portions of the trial court's closing instructions (Pet. 6) have been taken out of context. They both deal with the charge of conspiracy rather than the substantive count of unlawful concealment, and the second excerpt is merely a part of the judge's review of the evidence. Read in their entirety, the instructions were complete and correct. Indeed, at trial petitioner raised no objection to any matter which he now contests.

The cases cited in the petition (Pet. 6–7) are clearly distinguishable. Each involved a substantive charge of unlawful concealment, with a lapse of six months or more between the time the defendant was shown to have possessed the assets and the appointment of a receiver, so that the inference of continuous possession became unreliable with the passage of time. See, *e.g., United States* v. *Schireson,* 116 F. 2d 881, 885 (C.A. 3). Here, upon the evidence presented to the jury, it was clearly "permissible in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession." *Maggio* v. *Zeitz,* 333 U.S. 56, 65.

Accordingly, petitioner has not presented any consideration which would warrant further review in this case, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
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Attorneys.

MAY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966